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By

Panagiotis Delimatsis

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'Thou shall not…(dis)trust': Codes of Conduct and Harmonization of Professional Standards in the EU

PANAGIOTIS DELIMATSIS*

A. Introductory Remarks

The European Commission's Proposal for a Services Directive (hereinafter 'the Proposal')[1] recognized the importance of the concept of trust in the achievement and the smooth functioning of a genuine internal market for services. The lack of trust reveals the absence of a 'thinking European' mentality[2] and is translated into protectionist pressures that aim to foreclose foreign competition. The difference between trust and protectionism is fairly nuanced. Distrust can lead to protectionist pressures in that the latter can be the result of the concern that foreign (intra- or extra-EU) suppliers deliver their services more efficiently or that foreign suppliers are not equally good as the domestic ones. Regardless of whether we follow the first, rather self-interest approach or the second, more benevolent, public-interest approach, the result is the same: Domestic markets impose unduly burdensome restrictions and foreign professionals' mobility within the Union is curtailed. Furthermore, the lack of trust negates the possibility of comparison and thus obliterates any motivation for domestic service suppliers to improve.[3]

Hence, services and service suppliers from other Member States (MS) are viewed with suspicion and considered as menacing the allegedly 'exceptional' quality of the domestic service industry.[4] Of course, the very abolition of the country of origin principle acrimoniously demonstrates the absence of mutual trust in the current stage of European integration and how long and winding the road may be until mutual trust among the MS is actually established. Building trust is a macro-process deeply rooted into the history of European integration and a continuous challenge for such a diverse region in terms of economic strength, regulatory approaches, or constitutional and cultural background. In the end, it forms integral part of the *telos* of the European adventure.

In the absence of the country of origin principle and thus quasi-automatic mutual recognition, the creation of codes of conduct (CoC) at a European level as an

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* Assistant Professor of Law, Tilburg University, The Netherlands. Contact: p.delimatsis@uvt.nl.

[1] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market', COM(2004) 2, 13 January 2004.

[2] European Commission, 'The State of the Internal Market for Services', COM(2002) 441 final, 30 July 2002, p. 45.

[3] For the positive effects of mutual trust, see the seminal work by F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Free Press, 1995).

[4] This suspicion takes typically the form of systematic application of the host-country rules rules, the simple evocation of "general good" objectives to justify obstacles, without verifying the equivalence of the protection in the country of origin or the proportionality of the restriction, the subjection of EU operators to the same system as that applied to third-country undertakings, the presumption of circumvention of national rules by any cross-border service, or a particular zeal in regularly checking suppliers from other Member States. Ibid., pp. 53-54.

alternative, soft method of rule-making acquires new dynamics. The Proposal, and the ensuing Services Directive,[5] identifies various instruments that can be used to reinforce trust in the quality of the legal regimes and qualification or licensing requirements of the other MS in its paragraph 5. One of these instruments is the creation of pan-European CoC dealing notably with issues such as commercial communications or rules of professional *ethos*.[6] CoC, while voluntary, soft-law instruments, are considered as partaking in the effort to increase the 'awareness of Europeanness',[7] pursue legitimate objectives that are accepted as valid at Community level and ultimately guarantee a high level of quality commensurate with the ever-increasing expectations of the EU citizens with a view to enhancing trust among MS as to the equivalence of services and service suppliers originating in other MS.

This paper aims to explore the impact of CoC on the liberalization of professional services using as a starting point the Services Directive and the ever-lasting attempt to harmonize professional standards at EU level. Effective market access for service suppliers can depend heavily on such codes, which are typically adopted by non-state bodies when they exercise their legal autonomy, e.g. professional associations, sports federations etc. While such (mostly voluntary) rules of conduct are aimed to improve the quality of the services supplied by the professionals subject to such rules, they can nevertheless hinder the intra-EU movement of professionals. Hence, liberalization of factor mobility enshrined in primary and secondary EC law or agreed on during state-to-state negotiations at a multilateral level can be jeopardized by the adoption and application of such codes.

B. Setting the Scene: The Services Directive

In 2002, the Commission in its report on 'The State of the Internal Market for Services',[8] which formed part of the internal market strategy for services adopted by the Commission in December 2000,[9] was adamantly describing the dramatic situation as to the never-ending tale of completing the internal market for services. Complex legal barriers have been substituted for physical and technical barriers, thereby diminishing the possibilities for a genuine, integrated internal market for services. The fragmentation of the regulation of the supply of services within the European Union is worrisome, as it negatively affects the competitiveness of European firms and undermines the ambitious objective of the Union becoming the most competitive and dynamic knowledge-based economy worldwide ('Lisbon Strategy'). And yet services account for two-thirds of total employment and for all new employment growth within the Union,[10] while other studies praise the growth-

[5] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L 376/36. The directive is to be implemented by December 2009 at the latest. For a detailed account of the Directive, see C. Barnard, 'Unravelling the Services Directive' (2008) 45 *Common Market Law Review*, 323-394.

[6] The other instruments are: (minimum or targeted) harmonization; administrative co-operation and mutual assistance between national authorities; and (voluntary) measures promoting the quality of services. See also the 7th recital of the Services Directive.

[7] Supra note 2.

[8] European Commission, supra note 2.

[9] European Commission, 'Internal Market Strategy – Priorities 2003-2006', COM(2003) 238, 7 May 2003. This strategy came as a response to the request by the Lisbon European Council in March 2000. See the Presidency Conclusions of the Lisbon European Council, para. 17.

[10] European Commission, 'New European Labour Markets, Open to All, with Access for All',

generating effects and positive spillovers of services liberalization.[11]

The EU as a block is the leading player in international trade in services with a surplus of €68.5 billion in 2006, representing a world share in trade in services of around 25%.[12] In business services, which incorporate professional services, the EU-27 has achieved a surplus of €31 billion in 2006, one of the highest scores that year. Outsourcing, of course, is one of the main reasons explaining the sector's rapid growth. Intra-EU 27 trade in services, on the other hand, amounts to 57% of total exports of services[13] and accounts for one-quarter of the global trade in services.[14]

Services exert an essential role in the overall functioning of markets, since they underlie the relations between producers and consumers. Services are an indispensable component of the information industry networks on which these relations between producers and consumers depend. Instantaneous interactive communication permits transactions in an increasing number of services to occur at the same time but in different places. This allows overcoming the previously indispensable requirement of proximity between consumer and service supplier and thus increases the tradability of services. Furthermore, the growing interpenetration of services and goods in the supply and demand cycles means that any policy seeking the optimal allocation of productive resources must now take into consideration regulatory issues in both goods and services.[15]

That being said, services are more vulnerable in regulations impeding their supply. Problems already start with the peculiar nature of services: services are typically non-tangible, non-storable, and above all heterogeneous with limited possibilities of mass production. In addition, many of the most 'effective' barriers to free movement of services relate to pre- or post-establishment of juridical and natural persons, as some kind of presence is still required.[16] In addition, quality, the 'holy grail' of every law or regulation governing services, is closely intertwined with the characteristics, qualifications, experience etc of each individual service provider. This trait of services regulations increases the transaction costs and undermines the pursuit of efficiency when regulating this highly diverse sector of the economy.

From an economic viewpoint, an important eccentricity of the nature of protection in services industries also is that most of the barriers to trade in services have quota characteristics. Consequently, such barriers tend to create economic rents for incumbent service suppliers. This is inevitable, since quantitative restrictions generate artificial scarcity, which in turn leads to inflated prices and hence the creation of rents which induces incumbents to take action and strengthens their incentives to lobby to retain protection.

COM(2001) 116 final, 28 February 2001.

[11] *Inter alia*, A. Mattoo, R. Rathindran and A. Subramanian, 'Measuring Services Trade Liberalization and Its Impact on Economic Growth: An Illustration' (2006) 21(1) *Journal of Economic Integration*, 64-98.

[12] Eurostat, *Europe in Figures – Eurostat Yearbook 2008*, p. 358. It bears mention that these date do not include sales of foreign affiliates, the so-called mode 3 under the GATS.

[13] Eurostat, 'Statistics in Focus', 57/2008.

[14] IMF, *Balance of Payments Statistics*.

[15] P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford University Press, 2007), at 62-63. For this intermingling, compare C-390/99, *Canal Satélite Digital* [2002] ECR I-607, paras 31-33.

[16] Cf. P. Delimatsis, 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services Through Article VI of the GATS' (2007) 10(1) *Journal of International Economic Law*, 13-50, at 16.

The Services Directive ambitiously aims to change this situation and eliminate remaining legal barriers to the achievement of the internal market in services, while ensuring legal certainty for service suppliers and consumers. It adopts a horizontal approach based on the understanding that, while ubiquitous and diverse, several services sectors call for regulatory intervention to pursue a certain set of legitimate policy objectives such as consumer protection, the integrity of the profession, or ensuring the quality of the service, which appears to be common to more than one sectors.

According to estimations made by the European Commission, this new framework, when transposed to national laws, is expected to increase the EU's real GDP by 1.8% and to create 2.5 million additional jobs.[17] The objective of the directive is to enable both service suppliers and consumers to benefit from the fundamental freedoms guaranteed in Articles 43 and 49 ECT, that is, the freedom of establishment and the freedom to provide services in a cross-border manner.[18] In this respect, the directive consolidates previous European Court of Justice (ECJ) case-law on related issues. While numerous sectors are excluded from the scope of the Services Directive, the latter applies to business services and covers, *inter alia*, most of the regulated professions within the EU. In addition, and quite importantly, the directive adopts a sweeping definition of the term 'requirements' to cover 'any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy'.[19]

The directive calls for the creation of single contact points for service providers, the establishment or maintenance of electronic procedures, the promotion of the quality of the services supplied and the establishment of effective administrative co-operation among the MS. It also requires the review of national legislation and calls for mutual evaluation reports at the end of the transposition period. While the final text of the Services Directive did not include the country of origin principle, which would have led to extensive mutual recognition,[20] the adopted version is still deemed a step forward, as it consolidates the legal framework for many services and has the potential to reduce the red tape and remaining barriers in the service sector, while promoting the modernization of practices and procedures, notably through the creation of one-stop shops. Furthermore, the directive incorporates both mandatory and voluntary, soft-law provisions,[21] reflecting the intense bargaining that preceded the adoption of the directive. For the remaining obstacles to the free movement of services and the freedom of establishment, the directive calls for the respect of the

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[17] WTO, *Trade Policy Review – European Communities*, WT/TPR/S/177, 22 January 2007, p. 109.

[18] The Services Directive provides that suppliers already established in another MS cannot be prevented from providing their services in a given MS on the basis that they do not have an establishment in that MS (Art. 16:2(a)). For the sake of comparison, Art. 49 on the freedom to provide services is the equivalent of Mode 1, Mode 2 and Mode 4 under the GATS, since it covers the supply of services on a *cross-border* basis, the movement of *consumer* to the location of the supplier to *receive* the service and the *temporary* movement of the supplier in order for him to be able to supply the service in question in the host country.

[19] Art. 4:7) of the Services Directive. See also European Commission (DG Internal Market and Services), *Handbook on Implementation of the Services Directive*, 2007, p. 16.

[20] A. Mattoo and D. Mishra, 'Foreign Professionals in the United States: Regulatory Impediments to Trade (2009) *Journal of International Economic Law*, pp. 13-14 (Advance access, visited 2 June 2009).

[21] Sometimes *within* a single provision. Cf. Art. 26 of the Services Directive.

principles of necessity, proportionality, and non-discrimination.

Rationae personae, the directive only applies to service suppliers that are nationals of an EU MS (for natural persons) and to legal persons within the meaning of Article 48 ECT[22] who are established in an MS. On the other hand, services supplied by non-nationals of an MS or by entities not established in any of the EU MS fall outside the ambit of the directive.[23] Nevertheless, while services and services suppliers from non-EU MS do not benefit directly from this new framework, the endeavors to simplify procedures and 'screen' unnecessary obstacles to the supply of services across the EU as a result of the implementation of this directive can reasonably be expected to generate indirect benefits for all non-EU services and service suppliers seeking to provide services within the EU.[24] It requires, for instance, that all EU MS assess the impact of their legislation at all levels and reconsider domestic rules and measures that are out of proportion to their objective and have negative effects on trade in services. In the medium term, this should be expected to lead to better regulation, the modernization of bureaucratic practices and the streamlining of administrative procedures that will also be beneficial for service suppliers originating in third countries. Therefore, even in the absence of the country of origin principle, the effect of the directive should not be underestimated and should rather be deemed a major step towards further developing mutual trust. Fighting ignorance of EC law at the national level and lack of transparency regarding MS' national measures affecting the delivery of services as well as leveling the playing field with regard to the protection of public interest to a certain extent is an adequate way forward to further enhance trust among MS. Unfortunately, mutual confidence cannot come out of the blue and 'invisible hands' are simply a chimera when it comes to the cognitive part of trust, as exemplified by the 'Polish plumber' unfortunate narrative.

C. The Mandate for the Creation of Pan-European Codes of Conduct

The Services Directive calls for the creation of pan-European CoC. This initiative, however, highlights the fact that existing rules of conduct at a national level, while not discriminating on the basis of origin of the service supplier, can potentially constitute unnecessary barriers to the freedom to provide services and the freedom of establishment. This is so because they bring about regulatory asymmetries and market fragmentation, or otherwise impede the mobility of service suppliers or their ability to supply their services in a cross-border manner. As professionals increasingly supply their services across borders, the need for common sets of minimum rules of conduct which would determine the contours of the supply of a given service throughout the Union is becoming pressing with a view to achieving a genuine internal market for services. Ultimately, such sets of rules will ensure uniformity regarding the minimum level of consumer protection and a high quality of the services supplied at EU level.[25]

Furthermore, adequately pursuing public policy objectives at Community level is

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[22] Article 48 ECT makes reference to companies or other legal persons constituted according to the legislation of an MS which have their registered office, central administration or principal place of business within the EU.

[23] See also recital 37 of the Services Directive.

[24] See, for instance, Article 15 of the Services Directive.

[25] Handbook, supra note 19, p. 68.

essential in the pursuit of further enhancing trust between MS. Indeed, the current status quo with diverse CoC agreed on exclusively at a national level hints at a national perception of the quality of services. In addition, the fact that some professional associations in a given MS are not subject to a domestic CoC may create prejudice in other MS with regard to the quality of the services supplied by the members of these professional associations and ultimately lead to a certain distrust (in particular, when the services are supplied cross-border) and market fragmentation.[26] Therefore, the CoC's function is twofold: they facilitate mobility of service suppliers (mobility-enabling function), but at the same time aim to enhance trust vis-à-vis services and service suppliers originating in other MS (confidence-building function). Importantly, CoC will lead to the identification of a minimum, acceptable level of quality when a given service is supplied and, more importantly, to the emergence of a European concept of 'quality of service' in given services sectors which would be an identifiable trait of these sectors throughout and beyond the Union.

The Services Directive incorporates a convergence programme aiming to, inter alia, targeted harmonization in specific areas such as the access to the activity of judicial recovery of debts or private security services and transport of cash and valuables. An important part of this chapter forms the mandate directed to the MS and the Commission to incite the establishment of pan-European CoC. Article 37 of the directive reads:

> Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community level, particularly by professional bodies, organizations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community law.

In the absence of a top-down approach that the country of origin principle would substantiate, the directive puts the accent on the merits of a bottom-up approach where the private sector is called upon to exert a decisive role and serve the objective of furthering European integration. The call for the creation of CoC clearly is an element towards this direction. While technically forming part of Chapter VII of the directive, the mandate incorporated in Article 37 regarding the creation of pan-European CoC is deemed an essential component of the directive's most important objectives, as depicted notably in Chapter V of the directive, to improve the quality of the services supplied within the Union and to enhance transparency as to the conditions regulating the access to and the exercise of a given profession in the various MS.[27] Supplying services of high quality is rightfully considered as an essential prerequisite for the improvement of European competitiveness and the establishment of the Union as the best exporter of services worldwide, given the importance of services in the economies of all countries nowadays.

CoC appear to be particularly relevant for the so-called 'regulated professions' within the EU legal order where also compulsory registration with the corresponding professional associations exists.[28] A regulated profession is 'a professional activity or

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[26] See European Commission (DG Internal Market and Services), 'Enhancing the Quality of Services in the Internal Market: The Role of European Codes of Conduct', 2007, p. 6.
[27] See Handbook, supra note 19, p. 62.
[28] The use of CoC seems to be appealing to other areas of services such as information society services.

group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit'.[29] Regulated professions have two important traits: First, registration with the professional association is compulsory. Second, these professions are self-regulated for the most part. Compulsory registration allows for sanctions against those professionals who do not abide by the rules established by the professional body, including deontological rules usually contained in the sectoral CoC. Of course, not all professions oblige the relevant individuals to register with the professional association. Nevertheless, the mandate of Article 37 is equally – if not more – important for non-regulated professions, as the uniformity of rules of ethics that apply to them across the Union can be even looser. A common set of rules in these professions will enhance quality and trust from the side of the consumers, while allowing for the identification of those who may be 'cheating'.

Because of the manifest abundance of non-governmental collective rules in this area, including CoC, MS and the Commission recognized the beneficial effects of drawing up common sets of rules pertaining to issues such as independence, impartiality or professional secrecy which would apply to a given profession exercised across the Union. As professional associations become the final 'masters' of the pursuit of the corresponding profession at a national level (setting both pre- and post-access-related rules), typically through a governmental act that delegates its regulatory powers to the associations, one can realize the positive effects that some alignment of the ethical or other rules regulating the profession may have for the EU services market integration. In addition, the risk of abuse may be particularly high in case where domestic suppliers, in their function as members of the domestic professional association, may be called upon to decide on the aptitude of a service supplier originating in another MS and intending to establish herself in that market or applying for an authorization to deliver her services in a cross-border manner.

Furthermore, the creation of pan-European CoC would simplify the current conundrum with several national CoC applying to situations which go beyond national borders. For instance, take the case of the Lawyers Establishment Directive,[30] which establishes a mechanism for the mutual recognition of professional titles of migrant lawyers desiring to practise under their home-country professional title. The directive provides that a European lawyer must comply not only with the rules of professional conduct applicable in his home MS but also with those of the host MS, failing which she will incur disciplinary sanctions and exposure to professional liability.[31] Nevertheless, *quid* when these rules are conflicting? Or with services where it cannot be determined in which MS they are actually supplied?[32] The recognition of these problems calls for coherent solutions.

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[29] Art. 3(1)(a) of the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.

[30] Directive 98/5 of the European Parliament and the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 77/36.

[31] Ibid, Arts 6 and 7.

[32] For the sake of comparison, similar questions have been raised as to the distinction between Mode 1 (cross-border supply) and Mode 2 (consumption abroad) under the General Agreement on Trade in

Finally, the nature of other rules such as for instance limitations on the types of services that can be supplied or on the legal form that such services are allowed to be supplied may have a dissuasive effect on professionals of other MS otherwise capable of exercising the fundamental freedoms enshrined in Articles 43 and 49 of the Treaty.

The Services Directive does not contain any specific guidance with respect to the form of such CoC nor to their content. For instance, it does not attempt to give a hint of what ensuring the quality entails or what should be the level of protection pursued.[33] Rather, it bluntly spells out the *telos* of the mandate, that is, the facilitation of free movement pursuant to the Treaty.[34] Nevertheless, absent any further specifications under Article 37, the recitals preceding the main body of the directive are highly informative. Thus, it is first clarified that pan-European CoC should aim to ensure the quality of the service supplied and at the same time take into consideration the specificities of the profession at issue. In Article 26:3, the link is made between quality assurance, consumer protection and co-operation between professional bodies and consumer associations at Community level. This provision requires that MS, together with the Commission, enact appropriate measures to instigate co-operation of private associations at an EU level to promote the quality of services, notably by facilitating the proper assessment of the competence of a given provider. Diminishing the existing information asymmetries would lead to enhanced consumer protection and informed choices by consumers. Furthermore, their compatibility with legally binding rules relating to professional ethics and conduct at a national level and competition law at Community level should be ensured.[35]

In more general terms, CoC typically codify traditional virtues that have demarcated a given profession for decades or even centuries[36] and spell out binding obligations adopted by governments, usually going beyond what law prescribes.[37] They comprise rules relating to independence, impartiality, loyalty, professional competence and integrity, trustworthiness, confidentiality, conflict of interest, charging of fees and professional secrecy. CoC typically include rules about desirable behaviour (value orientation) and rules about prohibited behaviour (compliance orientation).[38] Such rules are typically related to professional conduct,

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Services (GATS).

[33] The Court appears to be ready to accept the Commission deciding on the level of protection which may be acceptable at Community level, having regard to the public interest pursued by the various MS. See Case C-233/94, *Germany v Parliament and Council* [1997] ECR I-2405, paras 16 and 17; also C-168/98, *Luxembourg v Parliament and Council* [2000] ECR I-9131, paras 43-44.

[34] In this sense, CoC have a *post*-law function in that they supplement and support the practical application of secondary law, in casu, the Services Directive. At the same time, it can be argued that they are intended as an alternative to Community legislation and therefore they can also be deemed to have a *para*-law function. See L. Senden, *Soft Law in European Community Law* (Hart Publishing, 2004), pp. 214-5.

[35] See recital 113 of the Services Directive. On the applicability of the EC competition rules to CoC, see below Section F.

[36] The Code of Professional Conduct, adopted by the Council of the Bars and Law Societies of the European Union (CCBE) in 1988 and most recently amended in 2006, underscores in its Art. 2.2 that trust and professional integrity are traditional virtues that constitute at the same time professional obligations. This Code is binding on any lawyer undertaking cross-border activities within Europe.

[37] For the purpose of this study, the concept of CoC should be considered as also encompassing elements that, in practice, may be found in quality charters. The latter comprise exclusively rules describing the manner in which the service is to be provided.

[38] See A. Nijhof, S. Cludts, O. Fisscher and A. Laan, 'Measuring the Implementation of Codes of Conduct – An Assessment Method Based on a Process Approach of the Responsbile Organisation'

but they may also call for a certain life style in private life.[39] Furthermore, depending on the specifics of the profession, they define the conflicting interests and ideally hierarchize them. For instance, Article 2.7 of the CCBE Code of Professional Conduct stipulates that the primary allegiance of a lawyer should be to her client, sacrificing her own interest and that of her colleagues.[40]

In several professional services, such as legal, CoC may call for the conclusion of professional liability insurance for errors and omissions the cover of which will depend on the nature and extent of the risk.[41] As compliance with this latter rule is typically reflected in the final price of the service delivered, agreement on common rules appears to be essential to avoid unfair price-based competition. For instance, competition can be distorted when domestic professionals are obliged to conclude such insurance, whereas cross-border suppliers or suppliers temporarily providing their services may not be bound by such a rule in their home state. The latter do not have to internalize any insurance cost in the final cost of their service and thus can offer it at a lower price.

CoC often also include provisions on disciplinary sanctions in case the rules are not abided by, although usually this deterrent is only used *in abstracto* and mentioned as a mere possibility.[42] However, civil or even penal sanctions cannot be excluded in the case of serious infringement.[43] CoC can also be used by Courts at least as supplementary evidence or means of interpretation.[44] This can be another reason why professional associations may be tempted to accentuate the importance and uniqueness of their profession for the entire society which may justify a different treatment from state public regulatory authorities and Courts at the national or, *in casu*, supranational level.[45]

Thus, CoC serve an imperative function for a given services (sub-)sector: Enunciating visibly its professional norms and reassuring external parties (consumers, colleagues, the government and the society overall) of the integrity, competence and the high standards enforced and maintained in the sector.[46] Rules incorporated in CoC thus aim to codify obligations that the professionals have to abide by to deserve the trust of their clients and the society overall. By adhering to such standards, professionals become trustworthy. The CCBE Code of Conduct is again revealing in this respect when it emphasizes the role of legal professional privilege noting that '[c]onfidentiality is…a primary and fundamental right and duty of the lawyer' and that '[w]ithout the certainty of confidentiality there cannot be

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(2003) 45 *Journal of Business Ethics* 65, at 66.

[39] For instance, Art. 2 of the International Code of Ethics adopted by the International Bar Association (IBA) in 1956 and amended in 1988 provides that:

> Lawyers shall at all times maintain the honour and dignity of their porfession. They shall, in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members.

[40] See supra note 36.

[41] The Services Directive hints at this possibility and the need for the conclusion of professional insurance cover. See recitals 98, 99 and Art. 23 of the Directive.

[42] See Art. 1.2.1 of the CCBE Code of Professional Conduct, supra note 36.

[43] See European Commission, supra note 26, p. 9.

[44] Cf. C-506/04, *Wilson* [2006] ECR I-8613, para. 65.

[45] Cf. Art. 1.1 of the CCBE Code of Professional Conduct, supra note 36.

[46] See N. Higgs-Kleyn and D. Kapelianis, 'The Role of Professional Codes in Regulating Ethical Conduct' (1999) 19 *Journal of Business Ethics* 363, at 364.

trust'.[47] Indeed, confidentiality and professional secrecy protect the client from indiscrete disclosures which may harm his integrity and reputation.[48] Interestingly, the Code goes on to suggest that the respect of this principle not only does it serve the interest of the client, but also the interest of the administration of justice and therefore deserves to be protected by the State[49]. In *AM & S*,[50] the ECJ also concurred with this view and upheld the principle of confidentiality of written communications between lawyers and clients. More generally, confidentiality and professional secrecy is 'an obligation of discretion forming part of the ethics of a profession'.[51]

Viewed under this angle, CoC also describe the conduct which the services recipients are *entitled* to receive from the professionals abiding by the CoC. Surely, the role of the governing professional body is crucial on this score due to its autonomous, self-regulatory power and the control that it exerts over its members. Professional bodies are there to ensure that professional traditions are adhered to. In *Cipolla*, the Commission implicitly referred to rules included in CoC for the legal profession in a favourable manner. More specifically, it contended that 'quasi-legislative rules, such as, inter alia, rules on access to the legal profession, disciplinary rules serving to ensure compliance with professional ethics and rules on civil liability have, by maintaining a high qualitative standard for the services provided by such professionals which those measures guarantee, a direct relationship of cause and effect with the protection of lawyers' clients and the proper working of the administration of justice'.[52]

In addition to these basic fiduciary standards, of particular importance for our purposes are two areas where the directive contains fairly detailed rules on the legality of restrictions: the first relates to commercial communications while the second refers to the establishment of multidisciplinary practices.

Rules governing commercial communications typically form part of CoC in several services sectors.[53] In the Commission's report on 'the State of the Internal Market for Services', the distortive effect of restrictive and detailed rules for such communications ranging from outright prohibitions on advertising to strict control of content was highlighted. Such restrictions are particularly burdensome for professionals or legal persons who are not established in a given jurisdiction and thus their only option to become known in that market is through this type of promotional

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[47] See Art. 2.3.1 of the CCBE Code of Professional Conduct, supra note 36.

[48] See Opinion of AG Maduro in Case C-305/05, *Ordre des barreaux francophones and germanophones and others* [2007] ECR I-5305, point 41.

[49] Cf. ECHR Judgment on *Foxley v. United Kingdom* of 20 June 2000, para. 50.

[50] 155/79, *AM & S* [1982] ECR 1575.

[51] See Opinion of AG Maduro in Case C-305/05, *Ordre des barreaux francophones and germanophones and others* [2007] ECR I-5305, point 37.

[52] Joined Cases C-94/04 and C-202/04, para. 63.

[53] Commercial communication includes any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organization or person engaged in commercial, industrial or craft activity or practising a regulated profession. See Art. 4(12) of the Services Directive. According to the Handbook, not only advertisitng but also other means of communication such as business cards mentioning the title and the specialty of the service supplier should be regarded as coming under this definition. See Handbook, p. 65. This, however, is too broad an interpretation. A business card, contrary to a prospectus or a brochure, would merely refer to factual information relating to the titles of the supplier or his contact details such as professional address and phone number. Therefore, it is argued that business cards would probably fit into the exception of Article 4(12)(a) of the Directive.

activities. Contrary to the case of goods, such rules impede the pursuance of a pan-European promotional campaign. The report identified the existence of such limitations in several sectors such as business (where most of the regulated professions are classified), distribution, telecommunication, or financial services.[54]

Article 24 of the Services Directive invites MS (but also professional bodies and private associations regulating the pursuit of a given profession in a collective manner) to remove all outright bans on commercial communications by the regulated professions, such as bans of all advertising in one or more media of communication.[55] The link with codes of conduct is made in paragraph 2 of Article 24 which requires MS to ensure that communications of this type are consistent with professional rules which are in conformity with EC law. These rules, usually enshrined in voluntary CoC, set rules, conditions and qualifications with respect to the independence, dignity and integrity of the profession or the adequate conduct relating to professional secrecy. The directive requires that such rules be non-discriminatory, justified by an overriding public interest requirement and compatible with the principle of proportionality. In addition, they have to be *specific* to the nature of the profession at issue. This specificity requirement calls for a case-by-case analysis of rules limiting commercial communications. The directive acknowledges the need for a bottom-up approach whereby the professionals themselves should agree on pan-European rules governing the adequacy of the content and methods of commercial communications in their respective profession, which will form integral part of the pan-European CoC for this profession.[56]

Another element that was identified in the Commission's report on the 'State of the Internal Market for Services' and picked up in the Services Directive is the consistency of restrictions or limitations relating to multidisciplinary practices with EC law. Article 25 of the Services Directive seeks the removal of requirements limiting the exercise of different activities jointly or in partnership where such restrictions are not necessary to ensure the impartiality, independence and integrity of the regulated professions or to guarantee compliance with the rules governing professional ethics and conduct.[57] The directive further specifies that several restrictions on such partnerships can be tolerated such as certification, accreditation, technical monitoring and testing services insofar as a close link with the objective of ensuring the independence and impartiality of the providers in question is established.[58] In the case, however, where MS decide to allow the creation of multidisciplinary partnerships, the directive requires that MS guarantee the prevention of conflicts of interest and the independence and impartiality of the providers. Importantly, the directive alludes to the findings of the *Wouters* case by reminding the importance of adopting rules of professional ethics and conduct, typically incorporated in professional CoC, which are compatible between the activities that are represented in these partnerships, especially when professional secrecy may be put in jeopardy.[59] In addition, and again based on the Court's

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[54] European Commission, 'The State of the Internal Market for Services', supra note 2, pp. 27-29.
[55] See also recital 100 of the Services Directive.
[56] Ibid.
[57] See recital 101 of the Services Directive.
[58] According to Arts 25:3 and 39 of the Directive setting a framework for mutual evaluation of laws and regulations in the area of services, MS shall evaluate existing restrictions and explain why they consider them as being justified, including why less restrictive means are not available in this respect. See Handbook, p. 66.
[59] In *Wouters*, the Court emphasized that restrictions relating to the creation of multidisciplinary

findings in *Wouters* and the directive, a separate examination of the specific nature of the relevant professions is warranted to uphold or deny the legality of restrictions against multidisciplinary practices.[60]

The directive calls for reviewing and assessing the relevant legislation, inter alia, relating to multidisciplinary activities against the conditions set out by the directive. As noted earlier, this screening process is bound to cover all relevant rules of professional bodies or collective rules of professional associations or any professional organizations which are adopted in the exercise of their right of self-regulating their profession. Requirements to be reviewed equally include rules adopted at all levels of government. Ideally, this process should lead to strong harmonization forces to ensure equivalent protection across the Union and ascertain a certain level of mutual trust to eliminate obstacles to the freedom to provide services.[61] Harmonization with regard to rules of multidisciplinary partnerships will also decrease the compliance costs for those service suppliers which have already adopted this business model in one MS, but due to restrictions in other MS, they cannot exercise their fundamental freedoms guaranteed by the Treaty.[62] In fact, nowadays the clientele is more sophisticated and thus the delivery of a gamut of services such as legal, accounting and tax advice within the same house renders the latter fairly attractive.[63] Moreover, restrictions on such partnerships may be more justified in certain services and less in others. Putting *Wouters* aside, it seems that there are feeble arguments justifying restrictions in partnerships between architects and engineers where the independence of the professional may not be as important as in other services such as legal or accounting. Under this perspective, minimum harmonization and the adoption of objective conditions across the Union appears to be compelling to allow the development of economies of scale and enhance the productivity of service suppliers through this type of synergy.

It follows that, although the directive adopts a rather liberal approach vis-à-vis the content of CoC allowing for a considerable room for manoeuvre to professional bodies to self-regulate their industry and establish deontological rules in co-ordination with their counterparts in other MS, it adopts a more meddling stance towards the need for common rules relating to commercial communications and multidisciplinary practices. Thus, the semantics are obvious: The chances that these categories of rules hinder the establishment of a genuine internal market and distort competition are high and therefore particular attention and action at Community level is warranted.

In all other respects, professional associations are called upon to set up pan-European CoC for their respective discipline taking into account the peculiarities of their profession and ensuring that rules guaranteeing independence, impartiality, integrity and professional secrecy are agreed upon.[64] While the directive remains silent as to

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practices can be justified if the activities in question are not bound by comparable requirements of professional conduct, *in casu* of professional secrecy. See Case C-309/99, *Wouters* [2002] ECR I-1577, para. 104.

[60] Ibid, paras 101-103. For the most important types of restrictions under this category, see European Commission, 'The State of the Internal Market for Services', supra note 2, p. 19.

[61] See Proposal, supra note 1, p. 4.

[62] See European Commission, 'Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market', Commission Staff Working Paper, SEC(2004) 21, 13 January 2004, p. 20.

[63] What the ECJ called 'one stop shop advantage' in *Wouters*, para. 87; Also WTO, Council for Trade in Services, 'Legal Services', Background Note by the Secretariat, S/C/W/43, 6 July 1998, p. 14.

[64] See recital 114 of the Directive.

the appropriate method to follow to draw up a CoC, the Commission draws attention to the significance of conforming to principles of good governance during that process.[65] The procedures should be open, publicly accessible, fair, non-discriminatory and objective. They should be communicated in advance to all professionals involved to ensure transparency, inclusiveness and representativeness.

However, it is for the MS to take all the necessary measures to encourage professionals to implement at national level these CoC. Of course, MS are allowed to take more stringent measures if they consider that the level of protection adopted at Community level is not commensurate with domestic desires and needs. By the same token, domestic professional bodies can seek higher levels of protection in their existing or future national CoC.[66] Viewed through this angle, then, pan-European and national CoC can co-exist and complement each other. Nevertheless, in order not to deprive of its *effet utile* the directive and the mandate relating to the creation of pan-European CoC, MS and/or professional bodies should be able to explain the particular situations that justify the stringency of the rules or conditions at the national level. The Commission, assisted by the Article 40 Committee, will be in charge of supervising the implementation of the directive and receiving notifications as to changes in laws, regulations, and requirements adopted by both public bodies and private bodies which, in the exercise of their legal autonomy, are allowed to adopt rules in a collective manner.

The creation of CoC becomes a shared obligation of MS and the Commission, which cannot be materialized without the active involvement of the private parties affected (or their associations) pursuant to Article 37. This tripartite approach brings together the most important actors in the regulation of business services across the Union. Just as under Article 26 where Members are required to encourage action by private parties,[67] Article 37 requires that MS, in co-operation with the Commission and obviously with associations representing service suppliers such as professional bodies or chambers of commerce as well as consumer associations, take practical steps so that service suppliers and professional associations create CoC at Community level to enable full use of the freedom to provide services and the freedom of establishment.

It bears mention that this privileged role of the Commission is ordained not only by its function as *Hüterin der Verträge*, but also in the aftermath of the Interinstitutional Agreement of 2003 on better lawmaking.[68] In this Agreement, a central role was entrusted to the Commission when recourse is made to alternative methods of regulation. Indeed, paragraph 17 of the Agreement provides that it is for the Commission to ensure that 'any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular the publicising of agreements) and representativeness of the parties involved.' In this respect, the Commission conducted a public on-line consultation in summer 2007 inviting professional organizations to submit information on their current CoC in force or under preparation, if applicable, and to express their views as

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[65] European Commission, supra note 26, p. 10.

[66] See recital 115 of the Directive.

[67] For instance, under Art. 26:1(b), MS, backed by the Commission, have to encourage service providers and their associations to draw up their own quality charters or labels at Community level. In addition, under Art. 26:5 of the Directive, the development of voluntary (obviously industry-driven) compatibility standards at Community level should be actively encouraged.

[68] European Parliament/Council/Commission, 'Interinstitutional Agreement on Better Law-making' [2003] OJ C 321/1.

to the most adequate content of such codes within their respective disciplines. The involvement of the Commission will be in all likelihood all the more active when self-regulation comes as a substitute for Community action in an area that comes under the competence of the Community, such as the creation of a genuine internal market for services and its proper functioning. In addition, the Commission will report to the other EU legislating institutions on the successes or failures of this experimentalist regulatory power transfer.

A weakness of the directive in its present form is that it does not set specific deadlines for the realization of the mandate. In the initial proposal, Article 40:2(b) required that the Commission shall intervene to propose solutions in cases where 'it has not been possible to finalise codes of conduct before the date of transposition [this would mean by the end of 2009] or for which such codes are insufficient to ensure the proper functioning of the Internal Market'. Obviously, a more nuanced and flexible stance is adopted in the final text of the directive whereby the role of the Commission is downgraded, whereas the optimism of finalizing some pan-European CoC is not reiterated. This absence of deadlines can be partly explained by the immense differences among services sectors that exist in practice with regard to co-ordinated efforts at Community level. Hence, choosing a less prescriptive approach was imposed by the reality. While 50% of the European professional organizations have already drawn up a European CoC for their profession,[69] others are not that advanced or successful in their efforts to create such CoC.[70] In addition, one can infer that the Commission is not always satisfied with existing CoC, as several of them do not appear to have respected basic standards of transparency, participation, representativeness, integration or responsibility.[71] This would manifestly mean that, insofar as CoC created at Community level are explicitly warranted and thus the role of CoC should be view from now on under a new perspective, existing CoC would need to be revisited to ensure that their creation complies with fundamental principles of good governance.

D. (European) Governance without (European) government: Alternative methods of regulation and harmonization of professional standards in the EU

The peculiar nature of services calls for the adoption of different regulatory approaches than those used in the goods' realm.[72] Contrary to the majority of goods, services are considered as being experience goods or even credence (or trust) goods, [73] as their quality cannot be evaluated until they are consumed or even years after the purchase took place due to asymmetries of information between the service supplier (agent) and the consumer (principal). This information asymmetry may lead to

[69] See, for instance, the code of the Architects' Council of Europe and the European Tax Federation.
[70] See European Commission, supra note 26, p. 10.
[71] Ibid.
[72] Delimatsis, supra note 15, pp. 87ff.
[73] P Nelson, 'Information and Consumer Behavior' (1970) 78(2) *Journal of Political Economy* 311; also GA Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488; and MR Darby and E Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16(1) *Journal of Law and Economics* 67. Darby and Karni actually demonstrate that in the case of goods that have credence qualities, a governmental intervention would not lead to an efficient allocation of resources and thus would be preferable to leave the market unregulated.

adverse selection and decline of quality as a result of competition based exclusively on price.[74] Several professional services (e.g legal, accounting, notaries) also have the public good characteristics of non-rivalry and non-exclusivity. They are important for the smooth supply of other services but also for the society and the unproblematic function of the economy overall.

Therefore, when the market itself does not sufficiently protect the relevant values, political decision-making proceeds to an evaluation of the situation in the market and, ultimately, it overrides it.[75] More specifically, the governmental intervention will prescribe the type of information that needs to be provided and will aid potential buyers to evaluate the information that is being supplied. Licensure, certification procedures, minimum harmonization, or liability laws are usual governmental instruments to ensure competence, performance, technical behaviour and accountability.[76] The primary advantage of legislation, then, is that, due to its inherently coercive qualities, it can improve resource allocation or aid to obtain other benefits in cases where markets are incapable of achieving these objectives on their own.

Overcoming the concern that self-regulation may be the ultimate form of regulatory capture and delegating regulatory power to professional bodies can constitute legitimizing a cartel with wide ability to determine or influence the regulatory framework to the benefit of professionals/members of the 'club' but to the detriment of consumers,[77] the European Union has gradually moved towards and encouraged the introduction of new forms of governance, also driven from the notorious principle of subsidiarity[78] and the Interinstitutional Agreement of 2003 on better law-making.[79] Previously, the White Paper on European Governance submitted by the Commission in 2001, initiating its 'Better Regulation Initiative' had also hinted at the way forward by recognizing that 'legislation is often only part of a broader solution' and that non-binding rules can be equally important for the attainment of a given objective.[80] Such statements were in line with the paradigm shift in domestic administrative laws and practices across developed countries in Europe and North America towards less rigidity and more power-sharing with those parties which had been asked for so many years to abide by the law without having participated or being asked of their views during its preparation.[81]

Abandoning the previous fairly rigid top-down approach and in a clear shift away from hierarchical forms of governing,[82] the Union adopted a new legislative culture according to which consultations enhance the involvement of interested parties and

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[74] Cf. Akerlof, supra note 73.

[75] If the market remains unregulated this would lead to a lowering of standards, as consumers would not be able to distinguish between low-quality and high-quality services. See also A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford University Press, 1994), p. 216.

[76] Also OECD, 'Competition in Professional Services', DAFFE/CLP(2000)2, 2000, 18ff.

[77] Cf. M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965).

[78] See also Lisbon European Council, Presidency conclusions, 23-24 March 2000, para. 38.

[79] European Parliament/Council/Commission, 'Interinstitutional Agreement on Better Law-making' [2003] OJ C 321/1.

[80] European Commission, 'European Governance – A White Paper' COM(2001)428, 25 July 2001, p. 20.

[81] Cf. J. Scott and D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1, at 8.

[82] P. Craig and G. de Búrca, *EU Law – Text, Cases, and Materials* (Oxford University Press, 2008) 146.

improve the quality of the policy outcome,[83] whereas alternative modes of regulation of both legislative and non-legislative nature enacted at the periphery complement and sometimes replace legislative action at Community level to achieve the objectives more effectively.[84] Such instruments can be those provided by the Treaty such as regulation, directive, recommendation, but also emerging ones such as co-regulation, self-regulation, voluntary sectoral agreements and codes of conduct, open method of co-ordination, financial assistance, or information campaigns.[85] The binary objective of diversifying the Union's regulatory instruments and simplifying and improving the regulatory environment are essentially driven by the concern to improve the effectiveness, legitimacy, transparency and legal certainty of regulation within the Union.[86] The experimentation with these instruments, nevertheless, must ensure swift and flexible regulation without affecting the EU competition rules or the unity of the internal market.

The Interinstitutional Agreement of 2003 provides with further clarifications as to the scope of the instrument of self-regulation and the framework within which it is expected to be utilized. The Agreement defines self-regulation as 'the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level'. Contrary to co-regulation, self-regulation does not involve a legislative act and is essentially voluntary.[87] Self-regulation leads to soft-law creation, soft law being defined as 'rules of conduct, that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'.[88] Self-regulation is more often than not a deliberate delegation of regulatory authority conceded by the State over a given activity to a body which is composed of representatives of that activity. As examples of self-regulation the Agreement makes explicit reference to codes of practice and sectoral agreements.[89] The Agreement goes on to make clear that the choice of such a voluntary, decentralized instrument does not imply any preferred solutions by the European Institutions nor does it preclude any future action by them. For instance, the Agreement stipulates that recourse to a legislative act based on a proposal by the Commission may be necessary when the self-regulatory body fails to comply with

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[83] European Commission, 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM(2002)704, 11 December 2002, p. 5. The Lisbon Treaty formalizes and generalizes the duty of the Commission to consult with civil society 'to ensure that the Union's actions are coherent and transparent'. See Art. 11 of the Treaty on European Union.

[84] This is in accordance with the principle of subsidiarity which suggests that the Community has to legislate 'only to the extent necessary'. See Protocol No 30 of the Treaty on the application of the principles of subsidiarity and proportionality. The Protocol goes on to stipulate that '[w]here appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternatives ways to achieve the objectives of the measures'. Ibid, para. 7.

[85] See European Commission, 'Action Plan "Simplifying and Improving the Regulatory Environment"', COM(2002)278, 5 June 2002, p. 7.

[86] N. Walker and G. de Búrca, 'Reconceiving Law and New Governance' (2007) 13 *Columbia Journal of European Law* 519.

[87] European Commission, supra note 85, p. 11. In the literature, however, several scholars consider the creation of CoC by the industry as a form of co-regulation. See, inter alia, F. Bignami, 'Three Generations of Participation Rights before the European Commission' (2004) *Law and Contemporary Problems* 61, at 74.

[88] Senden, supra note 34, p. 112.

[89] Interinstitutional Agreement, para. 22.

the Treaty or when the competent legislative authority requests it. This is yet another piece of evidence that the Classic Community Method is hale and hearty. Paradoxically at first blush, this recognition demonstrates that, at least potentially, regulations remain the ultimate powerful tool to fix problematic situations across the Union. They constitute an instrument that the Community institutions are not ready to abandon so light-heartedly – and justifiably so.

As noted earlier, the Commission's institutional role dictates that it closely supervises self-regulation practices to ensure compliance with the Treaty.[90] Notably, the Commission should ascertain the contribution of self-regulation practices to the realization of the Treaty objectives, but also their legitimacy. As conventional legal theory would deny to self-regulation a role equal to an independent source of law, the growing impact of private rule-making is part of contemporary reality and inevitably raises the issue of its legitimacy. In this regard, the Commission is bound to examine the extent of representatives of the parties concerned, the sectoral and geographical cover and the added value of the commitments at stake.[91]

Against this backdrop, the creation of pan-European CoC forms part of the non-legislative implementing measures that MS are called upon to take and arguably of a broader paradigm shift in EU regulatory making, dating back to the White Paper on European governance and the Commission's Action Plan on better lawmaking. Moving away from command-and-control regulation, the Services Directive adopts a mix of regulatory techniques, ranging from targeted harmonization where divergences are too wide to be maintained to alternative methods of regulation where the Union recognizes the reality of self-regulation in many business services and calls upon affected privates and their associations to participate in rules-shaping and decide on a common, pan-European set of rules on professional ethics and conduct of non-coercive nature that suits them best.[92]

A public-interest theory approach would also suggest that conceding regulatory powers to the suppliers concerned would be the most cost-efficient solution due to the specialized knowledge of the professionals and their organized bodies, notably when it comes to distinguishing between high-quality and poor-quality services and service suppliers, but also because of the professionals' ability to react more quickly and flexibly to new circumstances and adapt or revise their rules.[93] In addition, this type of alternative method of regulation is likely to allow for greater room for input, adaptation, and revision both from the part of those creating the rules and those subjected to the rules. Moreover, the choice of this type of instruments leads to wider ownership of the policies at stake, which appears quintessential when it comes to enforcement and compliance with rules of non-binding nature.

Furthermore, CoC have been traditionally seen with suspicion, as an attempt of the industries at issue to forestall state interference.[94] However one cannot turn the back

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[90] Cf. the EU self- and co-regulation database in the homepage of the European Economic and Social Committee (EESC), available at: http://eesc.europa.eu/self-and-coregulation/index.asp.

[91] Ibid, para. 23.

[92] See Proposal, supra note 1, p. 9.

[93] The Mandelkern Report used as ultimate criterion the satisfaction of the user and suggested that public intervention may be warranted only when the user is not satisfied. See Mandelkern Group on Better Regulation – Final Report, 2001, pp. 14-15.

[94] For this opinion, as it applies in the self-regulation of the legal profession and why in this sector co-regulation may be preferable, see F. C. Zacharias, 'The Myth of Self-Regulation' (2009) 93 *Minnesota Law Review* 1147, at 1173.

to reality: As Cutler puts it, 'a growing asymmetry or disjuncture between the formal legal status of private participants and their actual, political significance is growing more acute, portending a crisis of legitimacy'.[95] Nowadays, legitimizing influential rules set out in the exercise of private authority which may be by now de facto binding and complied with by the individuals/members to the professional associations becomes pressing. Instead of trying to disregard their existence and prominent role in everyday exercise of manifold professions and applying policies of exclusion, contemporary demands of participatory democracy would rather require an inclusive approach leading to the integration of these voices in rule-making and -shaping.[96] Whereas allowing professional bodies to regulate their own matters boils down to a question of social coherence, this upgrading of the role of private authority also calls for reforms and restructuring to ensure compliance with current demands for internal and external transparency, due process, legitimacy, accountability, fairness and inclusiveness. Such reforms also seem to be warranted in the process of implementing the Services Directive at the national level. Indeed, the directive includes several important transparency obligations referring to the conduct of the competent authorities. The definition of 'competent authority' is sufficiently comprehensive to also include '…professional bodies, and those professional associations or other professional organizations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof'.[97]

Another, perhaps more practice-oriented justification inherent in the mandate for the creation of pan-European CoC is the internationalization of the professions and the subsequent relativization of borders and jurisdictions.[98] The desire inherent in this mandate is that, where Community institutions have largely failed, private rule-making may provide with solutions that will come from the fated need of the business to expand across borders and the increasing demands of customers for first-rate delivery of services regardless of geographical borders and competent *fori*.

Regarding the harmonization of professional standards within the EU, the Community gradually replaced its strategy of adopting harmonization legislation enshrined in vertical directives during the '70s and mid-'80s with horizontal directives, applying across services sectors.[99] Those horizontal directives came in the aftermath of important decisions delivered by the Court relating to the principle of mutual recognition.[100] However, the general system directives fell short of ensuring recognition; they rather obliged MS to take into account qualifications and, if needed, impose additional requirements to achieve equivalence with nationals holding national titles. The new Directive on the recognition of professional qualifications, replacing all previous ones, aims to introduce a more flexible and automatic procedure which uses as a basis common platforms established by

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[95] See A. C. Cutler, *Private Power and Global Authority – Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003), p. 195.

[96] After all, participation is one out of the five principles of good governance identified in the Commission's White Paper on Governance.

[97] See Art. 4(9) of the Services Directive.

[98] Cf. with respect to legal services, C-193/05, *Commission v Luxembourg* [2006] ECR I-8673, para. 45.

[99] Directives 89/48 [1989] OJ L 19/16 and 92/51 [1992] OJ L 209/25.

[100] Most notably, Case 120/78, *Rewe-Zentral* (Cassis de Dijon) [1979] ECR 649; and C-340/89, *Vlassopoulou* [1991] ECR I-2357.

professional associations.[101] As a result of Directive 2005/36/EC on the recognition of professional qualifications, significant reforms in all EU MS regarding professional services were discussed with a view to fostering competition.[102] By recognizing the professional qualifications of a given individual, the host MS allows her to gain access in that MS to the same profession as that for which she is qualified in the home MS and to pursue it under the same conditions as the nationals. The profession can be considered as being the same if the activities are 'comparable'.

In cases where the horizontal directive does not apply, the principles outlined by the ECJ in *Gebhard*, *Heylens*, *Vlassopoulou*, *Aranitis* and *Bobadilla* will still apply. This means that EC primary law continues to give guidance as to the proper modus operandi.[103] Indeed, as underlined in Dreessen, the object of the horizontal directives on recognition of qualifications should not be 'to make recognition of diplomas, certificates and other evidence of formal qualifications more difficult in situations falling outside their scope, nor may they have such an effect'. [104] More specifically, Article 43 requires that the national competent authorities take into consideration the knowledge, diplomas, certificates, qualifications and experience already recognized or acquired in another MS, give adequate reasons in case of non-recognition and allow for access to an effective judicial remedy. A similar type of comparison may also be warranted in the case of EU nationals who acquired formal qualifications and practical experience in a third country.[105] In practice, the Court will undertake a very broad interpretation of the fundamental freedom enshrined in Article 43 to outlaw any requirement which is liable to hinder or make less attractive the exercise of the right of establishment unless it is justified based on legitimate policy grounds and proportionate to the objective pursued.[106]

E. Applicability of Article 43 and 49 ECT to private action

Just as other soft-law instruments, CoC can support a normative discourse similar to hard law. While violations of legal obligations are perhaps more striking, soft undertakings can stimulate 'accountability politics' provided that they entail manifest normative commitments.[107] Thus a strategy of 'name and shame' can be very effective, notably in the area of professional services where individualism and personal reputation are still significant. As the boundaries between state, legally binding action and private, essentially voluntary action are increasingly blurred and private authority sometimes emerges as a law-maker of similar effectiveness to public authority, the scope *rationae materiae* and the value of the fundamental freedoms is growing. It is commonplace now that the fragmentation of the internal market for services also is the inevitable result of the divergent standards adopted by

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[101] C. Barnard, *The Substantive Law of the EU – The Four Freedoms* (Oxford University Press, 2007), p. 323.

[102] Several of these proposed reforms have been discussed in the European Commission, 'Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services', Commission Staff Working Document, COM(2005)405 final, 5 September 2005.

[103] See, for instance, C-531/06, *Commission v Italy* (not yet published), paras 35, 37.

[104] C-31/00, *Dreessen* [2002] ECR I-663, para. 26.

[105] See, inter alia, C-238/98, *Hocsman* [2000] ECR I-6623, para. 35.

[106] See C-108/96, *Mac-Quen* [2001] ECR I-837, paras 24-26; and C-370/05, *Festersen* [2007] ECR I1129, para. 26.

[107] See K. W. Abbott and D. Snidal, ' Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, at 452.

non-public bodies in MS, such as professional associations, sport federations, the social partners drawing up collective agreements, or interested parties or groups drawing up CoC or collective rules in the exercise of their legal autonomy.

Settled case-law of the ECJ makes clear that neutralizing the abolition of State barriers to market integration through obstacles stemming from rules (or the application thereof) set out by associations or organizations not governed by public law that are entrusted with broad legal autonomy and regulatory power cannot be allowed.[108] Indeed, rules of *any* nature set out by private bodies aimed at regulating gainful (self-) employment and the supply of services in a collective manner can impede the functioning of the internal market and thus come within the purview of the Treaty fundamental freedom provisions.[109]

Recognizing the fact that activities of market participants can be restricted not only by action taken by MS authorities but also by private action, the ECJ interpreted the fundamental freedoms in a broad manner with a view to enabling market participants to have equal opportunities to gain access anywhere throughout the Community. Hence, the traditional approach that horizontal effect was only applicable with regard to the rules of competition, whereas the rules on free movement only had vertical effect was abandoned.[110] In *Walrave and Koch*, for instance, the ECJ ruled that 'the rule of non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place they are entered into or the place where they take effect, can be located within the territory of the Community'.[111] Furthermore, the ECJ found that the provisions on the free movement of workers had not only vertical, but also horizontal effect in *Clean Car*[112] and *Angonese*,[113] noting that application of Article 39 only to public authority acts would disregard the fact that working conditions are typically governed both by public law and rules adopted by private persons. Thus, these rulings extended the *Defrenne* case-law[114] into the area of free movement of workers.

The attempt of the ECJ to adopt a coherent approach regarding the acceptance of the horizontal effect of the fundamental freedoms is more than obvious. In *Schmidberger*,[115] the Court had found that private action should be subject to the free movement of goods provisions. In this case, it applied horizontally the fundamental freedom by balancing the fundamental right to freedom of expression of a group of individuals who were demonstrating against the right of a transport company to exercise its rights deriving from the Treaty relating to the free movement of goods.[116] Even if the action in *Schmidberger* was brought against the State, the facts in the record suggest that the State was the third party in a situation where the constitutional rights of one private party were jeopardized by the actions of another.[117] In *Viking Line*,[118] the ECJ had to decide, inter alia, on the horizontal

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[108] 36/74, *Walrave* [1974] ECR 1405, paras 17, 23-24; 13/76, *Donà* [1976] ECR 1333, paras 17, 18; C-415/93, *Bosman* [1995] ECR I-4921, paras 83-84; C-176/96 *Lehtonen* [2000] ECR I-2681, para 35; C-309/99, *Wouters*, para. 120.
[109] C-519/04, *Meca-Medina v Commission* [2006] I-6991, para. 24.
[110] See, for instance, 41/74, *Van Duyn* [1974] ECR 1337, paras 4-8.
[111] 36/74, *Walrave* [1974] ECR 1405, para. 28.
[112] C-350/96, *Clean Car* [1998] ECR I-2521, paras 19-21.
[113] C-281/98, *Angonese* [2000] ECR I-4139, paras 33-34, 36.
[114] 43/75 *Defrenne* [1976] ECR 455, paras 31 and 39.
[115] C-112/00, *Schmidberger* [2003] ECR I-5659, paras 57 and 62.
[116] See also C-265/95, *Commission v France* [1997] ECR I-6959, para. 30.
[117] For an excellent analysis on this issue, see AG Maduro's opinion in C-438/05, *Viking Line* (not yet

effect of Article 43 on the freedom of establishment, i.e. whether a private undertaking can confer rights from this provision on which it can rely against a trade union or an association of trade unions. As expected, the ECJ had no difficulty in confirming the application of its settled case-law relating to horizontal effect also in the case of Article 43 *mutatis mutandis*.[119] The ECJ suggested that the collective action taken by the trade unions and the association thereof is liable to restrict the exercise of the freedom of establishment by another private party and thus violates Article 43.[120] In previous cases, the ECJ applied the free movement provisions to private action notably when it aims to bear on working conditions and access to employment[121] or in the case of sport associations due to their powerful influence over the organization of professional sports.[122]

In *Viking Line*, it is argued that the ECJ was willing to protect the economic freedom of the *employer*. As the AG Maduro noted, 'the possibility for a company to relocate to a Member State where its operating costs will be lower is pivotal to the pursuit of effective intra-Community trade'.[123] A similar conclusion seems to be apposite also in *Laval*.[124] In this case, the ECJ accepted the horizontal direct effect of Article 49 by underscoring, based on the aforementioned case-law, that rules which are designed to regulate collectively the provision of services cannot escape the scope of the freedom to provide services by the simple fact that they are not public in nature.[125] Confirming its stance in *Viking Line*, the ECJ again appeared to balance the conflicting rights (fundamental freedom against fundamental rights to protect workers against social dumping) in favour of free movement. In this case, however, it was more eloquent than in *Viking Line*. Whilst in the latter, the ECJ suggested that it is for the national court to undertake the proportionality test, in *Laval* the ECJ, in light of the severity of the means chosen by the domestic trade union (i.e. a blockade of sites), decided to undertake the proportionality test itself to conclude that it was not met, based on the safety net already provided by the Directive 96/71 on posting of workers and on the obscurity or lack of provisions altogether specifying the obligations of employers with respect to minimum pay. However, it would be erroneous to consider that the ECJ adopted a human-rights- or labour-unfriendly stance. Arguably, the rulings of the ECJ are strictly fact-specific and should not be used to draw more general conclusions as to social protection within the Union. On the other side, it would be safe to say that the ECJ is not prepared to overrule light-heartedly a restriction to the fundamental freedoms, notably when their application may ensure an optimal allocation of resources throughout the Union.

It follows from the previous discussion that the ECJ is determined to outlaw any provision of any nature which can be capable to prevent or deter an EU citizen from leaving his home country to exercise her right to freedom of movement. Any signal of disadvantaging nationals of another MS in the territory of a given MS, which subsequently impedes or renders less attractive the use of the Treaty constitutional

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published).
[118] Ibid.
[119] Ibid, para. 61.
[120] Ibid, paras 72-73.
[121] C-281/98, *Angonese*; and C-438/00, *Deutscher Handballbund* [2003] ECR I-4135.
[122] For the relevant case-law, see supra note 108.
[123] AG Maduro's Opinion in *Viking Line*, point 57; the ECJ confirmed this view in para. 72 of the judgment.
[124] C-341/05, *Laval* [2007] ECR I-11767.
[125] Ibid, para. 98.

rights, can be sufficient to trigger the application of the free movement provisions.[126] In *Mobistar*, for instance, the ECJ submitted that rules which have the effect of making the provision of services between MS more difficult than the provision of services purely within one MS are to be outlawed.[127] When exercise of fundamental rights is in conflict with the exercise of the freedom of movement, the Court will attempt to strike a balance based on the facts of the case and the interests at stake. Nonetheless, neither fundamental rights nor fundamental freedoms are absolute.[128] The Court is willing to take up this daunting task, absent any serious attempt by the State to resolve the matter in a satisfactory manner. The Court's case-law hints at the need for a more pro-active and reflexive reaction from the State when such issues are raised to avoid recourse to judicial means. Indeed, MS may and should interfere with private rules by appropriate legislation or court decisions at any time. Given the risk of bias that may characterize private rules, such state intervention may become quintessential to restore the balance of rights and obligations or comply with the obligations enshrined in the Treaty.

Interestingly, however, this may not be the end of the story for our purposes of examining the consistency with EC law of restrictions based on CoC. Even if non-discriminatory, a restriction on free movement cannot be sustained unless it pursues an EU-consistent legitimate objective, is justified by overriding reasons of public interest and complies with the proportionality principle. In *Gebhard*,[129] and more recently in *Wouters*, the Court found or implied that national measures liable to hinder or make less attractive the exercise of the right to free movement can be justified, based, inter alia, on professional ethics considerations. Hence, the protection of professional ethics can be considered as a legitimate, overriding reason of public interest.[130] It follows that when examining the compliance of CoC rules with Community rules on fundamental freedoms, the rules of professional conduct and ethics will be examined as a justification of the violation of free movement rules. Therefore, what would seem to be of paramount importance under this constellation is to what extent the measure that allegedly substantiates or is based on a rule of ethics and conduct complies with the principle of proportionality, that is, it is suitable for the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.[131] Again, governmental rules may override compliance with such ethical rules. For instance, in the case of an organized campaign to combat illegal activities such as money laundering, limitations to the principles of confidentiality and professional secrecy can be considered as proportionate and justified.[132]

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[126] C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11.
[127] C-545/03, *Mobistar* [2005] ECR I-7723, para. 30.
[128] To corroborate this view, see Art. 52:1 of the Charter of fundamental rights of the European Union, which provides that: '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. See also AG Maduro's opinion in *Viking Line*, point 23.
[129] C-55/94, *Gebhard* [1995] ECR I-4165.
[130] See, by analogy, in regard to the reputation of a given services sector. C-384/93, *Alpine Investments* [1995] ECR I-1141, paras 42-44.
[131] See, inter alia, C-415/93, *Bosman*, para. 104.
[132] See C-305/05, *Ordre des barreaux francophones and germanophones and others*, and the opinion of AG Maduro in this case.

F. The relevance of competition rules

Unquestionably, rules of professional conduct come under the scope of EU competition law, as they organize and influence the exercise of a given profession.[133] The compatibility of rules contained in CoC with EU law may be contentious when examined through the lens of competition law. Such an examination is however necessary to ensure that equal competitive conditions are offered to the economic operators active in the EU market.[134]

There are five principal categories of rules relating to professional services that may be in violation of EU competition rules. These relate to: price fixing; recommended prices and minimum fees;[135] restrictions relating to commercial communications; entry requirements and reserved rights; and regulations relating to legal form, ownership and multi-disciplinary practices.[136] In several instances, professional bodies have included these types of restrictions in their CoC and linked them to the proper conduct of the profession and the interests of the consumer.[137]

Empirical studies suggest that the theoretical perception alleging that a causal link exists between heavy regulation and better quality for consumers does not hold.[138] Economic theory further demonstrates that self-regulation, i.e. granting to a professional body a monopoly right over the pursuit of a professional service and allowing it to exert a restricting influence over entry to the profession, would generate important economic rents in the form of excess revenues for the incumbents. Prices in this case will be higher without in fact any indication of quality improvement. For instance, in *Cipolla*, the Commission argued that no causal link has been established between the setting of minimum levels of fees and a high qualitative standard of legal services.[139] Therefore, it is worth examining the applicability of EU competition rules to the rules that a professional CoC may comprise.

In *Meca-Medina*, the Court made it explicit that, even in the absence of economic activity, the non-application of the relevant fundamental freedoms does not exclude the application of Articles 81 and 82.[140] Rather, a separate analysis should be undertaken to examine whether (1) the rules governing the activity are created by an undertaking; (2) this undertaking restricts competition or abuses its dominant position; and (3) this restriction or abuse affects intra-community trade.

The concept of undertaking under EC law is relative. Case-law gives a functional content to this concept by considering as undertaking 'any entity engaged in an economic activity irrespective of its legal status and the way it is financed'.[141] Any activity, in turn, consisting in offering goods or services in a given market is deemed an economic activity.[142] Liberal professions, *inter alia*, come under this definition.

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[133] T-144/99, *Institut des mandataires agréés* [2001] ECR II-1087, para. 64.
[134] C-49/07, *MOTOE* (not yet published), para. 51.
[135] See also recital 73 of the Services Directive.
[136] European Commission, 'Report on Competition in Professional Services', COM(2004)83, 9 February 2004, p. 3.
[137] See, more recently, the Commission Decision of 24 June 2004 on the recommended prices for Belgian architects, case COMP/38.2549.
[138] OECD, 'Competition in Professional Services', supra note 76.
[139] Supra note 52.
[140] C-519/04, *Meca-Medina v Commission*, paras 30-31.
[141] C-41/90, *Höfner and Elser* [1991] ECR I-1979.
[142] C-49/07, *MOTOE* (not yet published), para. 22.

An entity can partially exercise public authority and thus not come under the purview of the competition rules, but still be subject to the competition rules if it additionally undertakes activities within a competitive market on which a number of undertakings act in competition.[143] However, entities whose activities are exclusively social or of public interest and are not pursued in competition with other economic agents in the relevant market are excluded from the scope of competition rules.[144] Case-law suggests that the concept of economic activity is to be interpreted broadly to include any activity which is capable of being carried on by a profit-making organization and under market conditions.[145] Non-profit entities are still to be considered as undertakings if they compete in the same market with entities which seek to make a profit.[146] The size of the entity or the extent of its economic success does not play a decisive role.[147]

In *Wouters*, the Court ruled that lawyers are undertakings within the meaning of the EU competition law, as they offer, against remuneration, services and bear the financial risks that failures may entail.[148] By the same token, in *CNSD*[149] customs agents were considered as undertakings, whereas in *Pavlov*[150] medical specialist doctors also came under this term. This would obviously apply for the overwhelming majority of the service suppliers delivering professional services. Furthermore, *à la Wouters*, the professional body should be considered as an association of undertakings pursuant to Article 81 for it influences the conduct of its members on the market in the respective services sector and directs them to act in a particular manner when they carry their economic activity.[151] Nevertheless, the governing professional body does not come under Article 81 if it is composed of a majority of representatives of public authorities and is required to observe pre-defined public interest criteria.[152]

In addition, an association of undertakings can be itself an undertaking in case it exercises any economic activity. Thus, rules created in the exercise of the body's regulatory autonomy such as CoC constitute a decision adopted by an association of undertakings within the meaning of Article 81:1.[153] If such decisions affect trade between MS[154] and de facto or de jure prevent, restrict or distort intra-EU competition, they are void by virtue of Article 81:2. The so-called intra-community clause is, again, interpreted fairly broadly to cover any behaviour which may have an influence, direct or indirect, actual or potential, on intra-Community trade in a way

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[143] For instance, the city of Trier was deemed an undertaking. See C-475/99, *Ambulanz Glöckner* [2001] ECR I-8089.

[144] C-222/04, *Cassa di Risparmio di Firenze* [2006] ECR I-289, paras 120-121. Again, the absence of profit motive will not be determinant if there is competition with other for-profit organizations. See C-49/07, *MOTOE*, paras 27-28.

[145] C-264/01*, AOK Bundesverband* [2004] ECR I-2493, paras 50, 58.

[146] C-222/04, *Cassa di Risparmio di Firenze*, paras 122-3.

[147] Opinion of Advocate General Lenz in C-415/93, *Bosman* [1995] ECR I-4921, point 255.

[148] C-309/99, *Wouters*, para. 49.

[149] C-35/96, *Commission v Italy* (CNSD) [1998] ECR I-3851, para. 37.

[150] C-180/98, *Pavlov* [2000] ECR I-6451.

[151] C-309/99, *Wouters*, paras 63-4.

[152] C-35/99, *Arduino* [2002] ECR I-1529, para. 37-39.

[153] Ibid, para. 71. Also T-144/99, *Institut des mandataires agréés*, para. 62.

[154] This is an autonomous criterion that needs to be assessed separately. See Joined Cases 56/64 and 58/64, *Consten and Grundig* [1966] ECR 429. See also the Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81.

that can hinder the attainment of the single market.[155] The relevant market can be only the domestic market or even certain regions thereof.[156] As the Commission puts it, in this latter type of cases, 'the nature of the alleged infringement, and in particular, its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between Member States'.[157] Regarding the effect, it should be appreciable (*de minimis* rule)[158] and is to be established based on both quantitative and qualitative elements.[159] From particular importance, is the attempt to identify those practices which are capable of constituting a threat to freedom of trade among MS[160] in a manner which might harm the attainment of the objectives of the single market, notably by partitioning of markets on a national basis or hindering the economic interpenetration in contrast to the objectives of the Treaty. In *CNSD*, the Court clarified that agreements extending over the whole of the territory of a MS have, *by their very nature*, such an effect.[161]

Of course, these provisions do not aim to penalize every single agreement or decision that restricts the freedom of action of the parties or of one of them. Rather, the courts should examine the objectives of the agreements or decisions and the overall context in which the agreements or decisions are concluded or produce their effects, as well as whether the consequences which restrict competition are in fact inherent in the pursuit of those objectives and are limited to what is necessary to ensure the proper conduct of the profession, as it is organized in the MS at stake.[162] In this analysis, then, the peculiarities of the domestic market and of the specific profession will have a central role.[163] In *Wouters*, the CoC found that outright prohibitions of multidisciplinary practices in the legal profession are inconsistent with Article 81:1(b) because they are liable to limit production and technical development,[164] as they do not allow the exploitation of the one-stop-shop advantage, the supply of 'full service' and the possible diminution of costs. However, the ECJ submitted that the rules at issue were designed to ensure the proper conduct of the profession and the sound administration of justice and therefore were justified and proportionate, thereby striking a balance between the anti-competitive behaviour and the pursuit of non-economic legitimate objectives. By the same token, anti-doping rules, while prima facie restrictive of competition, were justified because they were designed to ensure fair rivalry among sport athletes and complied with the principle of proportionality. State compulsion can also function as a defence under Article 81; it cannot, however, be invoked when the national law merely allows, encourages or makes it easier for undertakings/associations to engage in autonomous anti-

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[155] C-295/04, *Manfredi* [2006] ECR I-6619, para. 42.
[156] C-475/99, *Ambulanz Glöckner*, para. 38.
[157] See Commission's Guidelines, supra note 154, para. 77.
[158] Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/13.
[159] Joined cases, C-215/96 and C-216/96, *Bagnasco and Others* [1999] ECR I-135, paras 47, 60; C-49/07, *MOTOE*, para. 39.
[160] Just as under the WTO case-law, ECJ case-law confirms that effects are essentially immaterial. See Case C-55/96, *Job Centre* [1997] ECR I-7119, para. 36.
[161] C-35/96, *Commission v Italy* (CNSD), para. 48.
[162] C-519/04, *Meca-Medina v Commission*, paras 42, 47.
[163] Joined Cases C-94/04 and C-202/04, *Cipolla*, para. 68. See also European Commission, supra note 136, p. 19.
[164] C-309/99, *Wouters*, para. 90.

competitive conduct.[165]

It still remains to be examined whether, when adopting rules enshrined in CoC, the professional associations can act inconsistently with Article 86 relating to dominant position.[166] Settled ECJ case-law portrays this concept as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[167] Importantly, in *MOTOE*, the Court clarified that an undertaking can, inter alia, acquire a dominant position when it is granted special or exclusive rights enabling it to determine whether and under what conditions other undertakings can have access to the relevant market and supply their services.[168] It further found that Articles 82 and 86:1 are violated when granting such rights within the meaning of Article 86:1 is liable to create a risk of an abuse of a dominant position.[169]

By analogy, then, a professional association, to which have been granted the power to self-regulate the conditions of a given professional activity as well as the power to decide on the well-founded of the applications for authorization to exercise a given professional activity, could be considered an undertaking to which a MS has granted special rights within the meaning of Article 86:1. However, this would presuppose that the professional association that previously has been considered as an association of undertakings is also an undertaking itself for the purposes of Article 82. As noted earlier, economic activity is a precondition for the applicability of Article 82. A professional association, however, does not carry on an economic activity under Article 82.[170]

Alternatively, Article 82 can apply if it can be proven that there is a collective dominant position where more undertakings which are legally independent of each other present themselves to act together on a particular market as a collective entity.[171] As all professionals can be regarded as undertakings within the meaning of EC competition rules, Article 82 could arguably apply in the case of a highly concentrated and homogeneous profession such as accountancy if it can be ascertained that economic links exist between the undertakings/professional service suppliers which enable them to act together independently of their competitors, their customers and consumers.[172] In *Wouters*, the Court rejected the applicability of Article 82 in the case of the legal profession arguing that lawyers 'are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated' and that the legal profession 'is highly heterogeneous and is characterised by a high degree of internal competition' without sufficient structural links between lawyers.[173] Again, even if collective dominant position is upheld, it needs to be demonstrated that abuse of such position has

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[165] C-198/01 *Consorzia Industrie Fiammiferi* [2003] ECR I-8055, paras 52-56.
[166] Articles 81 and 82 can be applied simultaneously. See 322/81, *Michelin* [1983] ECR 3461, para. 30.
[167] 27/76, *United Brands v Commission* [1978] ECR 207, para. 65.
[168] C-49/07, *MOTOE*, para. 38.
[169] Ibid, para. 50; also C-41/90, *Höfner and Elser* [1991] ECR I-1979, para. 29.
[170] C-309/99, *Wouters*, para. 112.
[171] Joined cases, C-395/96 and 396/96, *Compagnie Maritime Belge Transports SA* [2000] ECR I-1365, para. 36.
[172] Ibid, para. 42 ; and T-193/02, *Piau* [2005] ECR II-209, para. 111.
[173] C-309/99, *Wouters*, paras 113-4.

occurred, as clarified in *Piau*.[174]

G. Conclusion

The implementation of the Services Directive should bring new dynamics in the creation of effective codes of conduct and the building of trust among the peoples of the Union. It is submitted that CoC have been used as a vehicle for introducing several requirements and conditions applied to professionals to foreclose the relevant market and increase the rents for the incumbents over the years. Although it was correctly pointed out that CoC create expectations to third parties, the unpalatable truth is that they cannot alone result in consistently improved professional behaviour.[175]

Our analysis above demonstrated that the ECJ has adopted a lenient and fairly deferential approach when examining arguments of ethics, professional secrecy, integrity and reputation of the profession and other qualitative elements that CoC should aim to preserve and enhance. On the other hand, the proportionality test that the Court will apply in this case will be country- and sector-specific. The precise traits of the market and the nature of the profession and its inherent characteristics will be the focus in the proportionality test. More flexible solutions adopted in other countries will not automatically render disproportionate the solutions adopted in the MS in question.

Among several provisions of the directive that call for reform, Article 15 provides that self-regulating professional bodies need to evaluate several restrictions enshrined in domestic CoC which may relate to business structures and legal form, fixed pricing, or territorial restrictions, whereas other provisions discussed earlier underscore the importance of revising restrictions on commercial communications. According to the directive, some of these types of measures, including commercial communications, should form integral part of any attempt to draw up CoC at Community level for them to be meaningful. The task of creating such CoC appears to be daunting, and so will be their implementation once they are adopted at Community level. The directive specifies that MS will take accompanying measures encouraging professional associations to implement at national level the pan-European CoC. As another piece of evidence of the bottom-up approach adopted, the role of national professional associations is quintessential in each and every stage of this process, from the decision over the content of the pan-European CoC to the surveillance of their implementation and the potential application of disciplinary sanctions. While the directive does not specify whether the CoC drawn up at Community level will be binding, the long-term preferred constellation is obvious from the structure of the directive: Initially voluntary CoC adopted at Community level which will be transposed at the national level (replacing the current national CoC, if needed) and become binding, thereby ensuring a minimum level of homogeneity and acceptable professional conduct across the Union with regard to issues such as ethics, professional secrecy, integrity, impartiality, business structure, or advertising.

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[174] T-193/02, *Piau*, para. 117.
[175] Higgs-Kleyn and Kapelianis, supra note 46, p. 365.